No. 83-1284

In the Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN HOSPITAL ASSOCIATION, PETITIONER

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Secretary of Health and Human Services exceeded the scope of her statutory authority in promulgating 42 C.F.R. Pt. 124, Subpts. F and G, which specify how hospitals that have received federal funds under the Hill-Burton Act are to comply with their assurances concerning service to their communities and to the indigent.

2. Whether 42 C.F.R. Pt. 124, Subpts. F and G, are inconsistent with principles expressed in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b-33b) is reported at 721 F.2d 170. An earlier opinion of the court of appeals denying preliminary injunctive relief (Pet. App. 1d-31d) is reported at 625 F.2d 1328. The memorandum opinion of the district court (Pet. App. 1c-15c) is reported at 529 F. Supp. 1283.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1983. The petition for a writ of certiorari was filed on January 30, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

REGULATIONS INVOLVED

42 C.F.R. Pt. 124, Subpts. F and G, are reproduced at Pet. App. 1e-14e.

STATEMENT

1. Title VI of the Public Health Service Act (commonly known as the Hill-Burton Act), 42 U.S.C. 291 *et seq.*, enacted in 1946, authorized grants (and later loans and loan guarantees) to public and private nonprofit entities for the construction and modernization of medical facilities. Such assistance was provided through allotments to states and was to be used in accordance with federal regulations and a state plan approved by the Surgeon General. 42 U.S.C. 291b-291d.[1] As a condition of assistance, medical facilities were required, inter alia, to provide assurances that the facilities would be "available to all persons" residing in the areas they serve and that they would make available "a reasonable volume of services to persons unable to pay." See 42 U.S.C. 291c(e)(1) and(2).[2] The two assurances are

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[1]The functions of the Surgeon General subsequently were transferred to the Secretary of Health, Education, and Welfare (now the Secretary of Health and Human Services). 31 Fed. Reg. 8855 (1966).

[2]Section 291c provides in pertinent part:

> The Surgeon General, with the approval of the Federal Hospital Council and the Secretary of Health, Education, and Welfare, shall by general regulations prescribe —
>
> * * * * *
>
> (e) that the State plan shall provide for adequate hospitals * * * for all persons residing in the State, and adequate hospitals * * * to furnish needed services for persons unable to pay therefor. Such regulations may also require that before approval of an application for a project is recommended by a State agency to the Surgeon General for approval under this part, assurance shall be received by the State from the applicant that (1) the facility or portion thereof to be constructed or modernized will be made available to all persons residing in the territorial area of the applicant; and (2) there will be made available in the facility or portion thereof to be constructed or modernized a reasonable volume of services to persons unable to pay therefor, but an exception shall be made if such a requirement is not feasible from a financial viewpoint.

often referred to as the "community service" and "uncompensated services" obligations.

Regulations implementing the Hill-Burton Act were first issued in 1947. See 12 Fed. Reg. 983. Until 1972 the regulations generally tracked the language of the statute, without providing specific standards against which to measure the adequacy of hospitals' compliance with their assurances. In 1972, the Secretary of Health, Education, and Welfare promulgated regulations governing the uncompensated services assurance of 42 U.S.C. 291c(e)(2); in 1974, the Secretary promulgated additional regulations governing the community service assurance of 42 U.S.C. 291c(e)(1). 37 Fed. Reg. 14721 (1972) and 39 Fed. Reg. 31767 (1974). The regulations defined "reasonable volume" in terms of either presumptive compliance levels or certification of an "open door" policy. In addition, the regulations established general compliance standards for the community service assurance and reporting requirements for state agencies, which were given responsibility for enforcing compliance with the regulations.

In 1975, Congress established a new assistance program for hospital construction and modernization under Title XVI of the Public Health Service Act, 42 U.S.C. 300*o et seq*. Congress provided for assurances similar to those prescribed by Title VI and for federal enforcement and standard-setting with respect to assurances given under both Title VI and Title XVI. Title XVI requires the Secretary by regulation to

> prescribe the general manner in which each entity which receives financial assistance under part A or B [of Title XVI] or has received financial assistance under part A or B or [Title VI] shall be required to comply with the assurances required to be made at the time such assistance was received and the means by

which such entity shall be required to demonstrate compliance with such assurances.

42 U.S.C. (Supp. V) 300s(3). In response to this statutory mandate, the Secretary promulgated the regulations challenged in this case.

Subpart F of 42 C.F.R. Pt. 124 establishes a quantitative annual standard for compliance with the uncompensated services assurance. In order to comply, a facility must expend three percent of its operating costs for the prior fiscal year or ten percent of the amount of federal assistance received (adjusted for inflation after 1979), whichever is less. 42 C.F.R. 124.503(a). Compliance levels are adjusted to account for deficits and excesses in compliance in previous fiscal years, beginning with 1979. 42 C.F.R. 124.503(b), (c) and (d). Recipients of Title VI grants must meet the compliance standards for a period of 20 years after completion of construction. Recipients of loans and loan guarantees under Title VI must meet the standards until the loan is repaid. 42 C.F.R. 124.501(b).

Subpart G of 42 C.F.R. Pt. 124 provides that, in order to comply with the community service assurance, a facility may not exclude persons in its territorial area who are able to pay, on grounds "unrelated to an individual's need for the service or the availability of the needed service in the facility." 42 C.F.R. 124.603(a)(1). Facilities must be accessible to beneficiaries of programs such as Medicare and Medicaid. 42 C.F.R. 124.603(c). Subpart G proscribes certain "exclusionary admissions policies" if their effect would be to exclude persons on grounds other than those permitted in Section 124.603(a). 42 C.F.R. 124.603(d).

2. Petitioner is an association whose members include hospitals that received federal construction funds under Title VI. Petitioner filed this action in June 1979 in the United States District Court for the Northern District of

Illinois, challenging the validity of 42 C.F.R. Pt. 124, Subpts. F and G. Petitioner contended that the regulations exceeded the Secretary's statutory authority, violated the contractual rights of hospitals, and were unconstitutional.

On cross-motions for summary judgment, the district court upheld the regulations in all respects (Pet. App. 1c-15c).[3] The court concluded that the regulations were a rational means to accomplish a valid legislative goal and did not deprive petitioner's members of property rights without due process (*id.* at 3c-9c). The court also held that the regulations were within the scope of the Secretary's statutory authority and could not be characterized as arbitrary or capricious (*id.* at 9c-14c).

3. The court of appeals affirmed (Pet. App. 1b-33b). The court of appeals concluded (*id.* at 10b (footnote omitted)) that it was "clear that the Secretary was acting within the scope of his statutory mandate" when he promulgated the regulations. The court found that conclusion to be fully confirmed by the legislative history (*id.* at 10b-15b). It concluded that the regulations did not violate any explicit statutory limits and were not arbitrary or capricious (*id.* at 15b-22b). Finally, the court of appeals rejected petitioner's claim that the regulations violated any contractual or constitutional rights, since the statute clearly imposed obligations on recipients of Hill-Burton funds and gave the Secretary discretion to define the scope of the obligations (*id.* at 23b-26b).

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[3]The district court denied petitioner's motions for a temporary restraining order and a preliminary injunction. The court of appeals affirmed the denial of preliminary injunctive relief (Pet. App. 1d-31d).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. The decision below is consistent with the holding of the only other court of appeals that has considered the validity of the challenged regulations. See *Wyoming Hospital Ass'n* v. *Harris*, No. 81-2469 (10th Cir. Feb. 6, 1984).[4] Further review by this Court is unwarranted.

1. There can be no doubt that the Secretary promulgated Subparts F and G pursuant to an explicit congressional delegation of substantive authority. The regulations are therefore entitled to great deference and should be upheld so long as they are not in excess of the Secretary's statutory authority and are not arbitrary or capricious. See *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 44 (1981); *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977). As the court of appeals' decision demonstrates, the regulations clearly meet this standard.

Petitioner asserts (Pet. 8-10) that the language of 42 U.S.C. 291c(e) and its legislative history do not indicate any congressional intent to require that hospitals provide a fixed level of services. But the statute is worded broadly and gives the Secretary authority to promulgate rules to implement it. There is no indication in the language of the statute that Congress intended to preclude the Secretary from defining a "reasonable volume of services" in terms of quantitative compliance levels. Nor does the legislative history suggest an intent to limit the Secretary's authority in that respect. In fact, following an exhaustive analysis of the legislative history, the court of appeals found that in both

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[4]We are lodging a copy of the opinion in *Wyoming Hospital Ass'n* with the Clerk of the Court and providing a copy to counsel for petitioner.

1946 and 1975 Congress was concerned with assuring provision of services as well as with construction of facilities and that it "strongly intended that the words of the statutory assurances be given a practical reality" (Pet. App. 15b).

As the court of appeals noted (Pet. App. 17b), the Secretary, in choosing quantitative compliance levels, was acting in part in response to congressional discontent with the agency's past failure to monitor and enforce the assurances. Indeed, by the time of the Secretary's action, a number of lawsuits had been filed to enforce compliance with the Hill-Burton assurances (see *id.* at 4b-5b, 13b, 19b). The court of appeals correctly concluded (*id.* at 17b) that, in view of past compliance problems, the Secretary's approach is "rationally related to the statutory goal of assuring access by the indigent to federally assisted facilities." Accord, *Wyoming Hospital Ass'n* v. *Harris*, slip op. 6-7.

Petitioner contends (Pet. 13-14) that the challenged regulations fail to give effect to the statement in 42 U.S.C. 291c(e)(2) that "an exception shall be made if [the uncompensated services] requirement is not feasible from a financial viewpoint." However, as the court of appeals observed (Pet. App. 20b), the statute does not mandate a total waiver of the uncompensated services obligation, and the Secretary's decision to allow deferral of compliance (as opposed to complete waiver) "seems eminently fair to the recipients of the aid."

Petitioner also complains (Pet. 14-16) that the 1979 regulations require hospitals to participate permanently in the Medicare and Medicaid programs, that these programs do not fully reimburse hospitals' actual costs, and that the difference between costs and reimbursement cannot be credited toward the uncompensated services obligation. However, a Hill-Burton hospital's obligation to participate in

these programs is implicit in the requirement that the hospital be "available to all persons residing in [its] territorial area." 42 U.S.C. 291c(e)(1). A hospital does not fulfill that obligation if it denies access to Medicare and Medicaid beneficiaries because of its nonparticipation in these programs. As the court of appeals noted (Pet. App. 19b), the Medicare and Medicaid participation requirement reflects case law interpreting the statutory community service obligation.

Petitioner objects (Pet. 16-17) to the fact that, unlike the uncompensated services obligation, the community service obligation is not limited to 20 years. But the statute does not provide for time limitations on the community service obligation, and the Secretary's regulations did not provide for a 20-year limitation until 1974. Thereafter several courts held the 20-year limitation invalid with respect to the community service obligation, on the ground that the limitation was plainly inconsistent with the statute and legislative purposes. See *Lugo* v. *Simon*, 426 F. Supp. 28, 36 (N.D. Ohio 1976) (citing *Cook* v. *Ochsner Foundation Hospital*, Civ. No. 70-1969 (E.D. La. Mar. 13, 1975)). Under these circumstances, the Secretary's removal of the limitation was clearly reasonable.[5]

Finally, petitioner asserts (Pet. 17-18) that the prohibition against exclusionary admissions policies set out in 42 C.F.R. 124.603(d) intrudes on hospital operations in

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[5]Petitioner cites (Pet. 17) 42 U.S.C. 291i, which establishes a 20-year limit on the period during which the government may recover a portion of the Hill-Burton assistance if there is a change in the hospital's status. As the court of appeals noted (Pet. App. 20b n.11), "this recapture provision has little relevance to the duration of the Hill-Burton facilities' assurances." Indeed, Congress's inclusion of a 20-year limit in 42 U.S.C. 291i suggests that its omission of such a limitation from 42 U.S.C. 291c(e)(1) was conscious. See *Lehman* v. *Nakshian*, 453 U.S. 156, 162 (1981).

contravention of 42 U.S.C. 291m.[6] The court of appeals correctly rejected this argument (Pet. App. 21b-22b). The regulations do not require hospitals to manage their operations in any particular way, so long as they avoid exclusion of patients on specified impermissible grounds. Moreover, 42 U.S.C. 291m begins with the phrase "[e]xcept as otherwise specifically provided." That phrase clearly permits an exception for requirements such as those imposed under 42 U.S.C. 291c(e). See *Wyoming Hospital Ass'n* v. *Harris*, slip op. 10.

2. Petitioner contends (Pet. 18-26) that the challenged regulations constitute a "unilateral, retroactive imposition of additional and unforeseen substantive conditions on those hospitals that received Hill-Burton funds many years before the 1979 regulations were promulgated" (*id.* at 19), and that the regulations therefore are inconsistent with principles expressed in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981). But that contention mischaracterizes both the holding in *Pennhurst* and the effect of the 1979 regulations.

In *Pennhurst* the Court considered whether a "bill of rights" contained in a federal statute providing for grants to states created an enforceable substantive cause of action by mentally retarded persons against the recipients of federal funds. The Court concluded that there was an insufficient basis for reading such a cause of action into the statute, since Congress had not unambiguously imposed such a

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[6] 42 U.S.C. 291m provides:

> Except as otherwise specifically provided, nothing in this subchapter shall be construed as conferring on any Federal officer or employee the right to exercise any supervision or control over the administration, personnel, maintenance, or operation of any facility with respect to which any funds have been or may be expended under this subchapter.

condition on the grant of federal funds. Here, in contrast, the statute clearly sets forth the uncompensated services and community service obligations and gives the Secretary broad discretion to define the scope of those obligations. Hospitals that applied for Hill-Burton funds were on notice that the Secretary could define the statutory requirements in a manner that would permit meaningful enforcement. In view of the failure of earlier regulations to produce adequate compliance, it was certainly not unreasonable to expect that the Secretary might adopt more effective enforcement mechanisms. Thus, the statute in this case is significantly different from the provision at issue in *Pennhurst*.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7]Petitioner criticizes the uncompensated services compliance level of ten percent of federal assistance and suggests that it has seriously harmed hospitals, citing a comparison with private financing alternatives. See Pet. 26-29; Pet. App. A. However, petitioner does not also suggest that the alternative compliance level (three percent of operating costs) is unduly burdensome. In any event, as the court of appeals stated (Pet. App. 17b-18b), the Hill-Burton program was not meant to serve simply as a commercial lending transaction, but was a means to accomplish important public purposes as well.

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